Nos. 91-1111; 91-1128

IN THE

THE SUPREME COURT of the UNITED STATES
October Term, 1992

Hartford Fire Insurance Co., et.al.
Petitioners

vs.

State of California, et. al.
Respondants

On Writ of Certiorari to the U.S.
Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF Respondents ~~PETITIONERS~~ OF SERVICE STATION DEALERS OF AMERICA

Dimitri G. Daskalopoulos
4801 Mass. Ave. N.W. #400
Washington, D.C. 20016
(202) 895-1650
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Interest of the Amicus

The Service Station Dealers of America is the national trade association that serves as the voice of America's 50,000 independent gasoline retailers and thousands of auto repair nationwide. The proper interpretation of the McCarran - Ferguson Act is one of vital concern to the SSDA members and has a significant impact on the marketing of motor fuel in this country.

Specifically, the SSDA would call the Court's attention to the "real world" impacts of the conduct of the defendants in this case.

SUMMARY OF ARGUMENT

The primary issue addressed by SSDA is whether the conduct complained of constitutes a boycott within the meaning of the McCarran-Ferguson Act. The economic

effect of the actions of petitioners

demonstrates that a boycott as defined in the decisions of this Court, as well as the language, history and purposes of the Act has occurred.

ARGUMENT

I. The Economic Effect of the "Boycott"

One of the central allegations of the complaints by both the states, as well as of the private parties is that a boycott has occurred that has restricted or eliminated the availability of certain primary insurances.

As the Ninth Circuit made clear and petitioners concede, the domestic insurers desired to exclude pollution coverage from CGL policies, particularly that for gradual pollution. (Pet. Br. @ 5) . As the 9th Circuit noted in its opinion:

" The parties to the agreement

agreed to accept retrocessional insurance only from reinsurers who signed a letter of intent stating the following: "We hereby agree that we will use our best endeavors to ensure that all U.S.A. and Canadian exposed insurance/ reinsurance business attaching on or after 1st January 1987 will only be written where the original business includes a seepage and pollution excluding clause wherever legal and applicable." The effect of this agreement was to deny insurance consumers in the United States property coverage for seepage and pollution. " (J.A. at A-12).

Much of the defendants' argument is devoted to recasting the defendants conduct

into a framework of a mere agreement on insurance terms and conditions, which they argue is per se immune from antitrust scrutiny under McCarran - Ferguson. In fact, the domestic defendants go so far as to urge this Court to make clear that the agreements at issue are at " the core of the statute's protection and, as a matter of law, do not constitute a boycott." (Pet. Br. @ 26, 27). The SSDA urges the court in the strongest possible terms to decline this invitation. In effect, the defendants are asking this Court to pass the Walter-Hancock blanket antitrust immunity bill rejected by Congress in 1944, as opposed to the legislation which actually passed.

As discussed in detail, infra, SSDA members as well as numerous plaintiffs are COMPELLED BY FEDERAL LAW to seek pollution insurance for leaks from underground storage tanks. The net effect of the

defendant's conduct has been to leave SSDA members in the precisely same position as the plaintiffs in St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 98 S.Ct. 2923 (1978) - unable to obtain (federally mandated) insurance on any terms and conditions.

In Barry, this Court held that the term "boycott" as used in Section 3(b) of the McCarran Act includes boycotts directed at not just competitors, but also policy holders. 438 U.S. at 552. This case involves both, either of which is sufficient to defeat McCarran immunity.

The Court must be aware of the effect of defendants actions in this matter on the retail gasoline market.

One of the most significant issues for gasoline retailers is the management of underground storage tanks. These tanks are regulated under 42 U.S.C. 6991 et. seq.,

the Solid Waste Disposal Act. Pursuant to that Act, the Environmental Protection Agency was directed to, and has promulgated regulations covering technical standards, corrective action, and for the purposes of this case, financial responsibility. 42 USC 6991b.

42 USC 6991b (d) required that financial responsibility regulations be issued, with a minimum coverage level of $ 1,000,000 per occurrence for a gasoline retailer. The statue provides that the financial responsibility provisions may be satisfied by any one, or a combination of mechanisms, including insurance. 42 USC 6991b (d)(1). The legislative history of the provision indicates that Congress and the affected retailers believed insurance would be the primary mechanism for satisfying the requirement. See generally, Italiano, Liability For Underground Storage

Tanks, (2nd Ed. 1992).

Under 42 USC 6991b (d)(5)(D), the EPA Administrator is authorized to suspend enforcement of the financial responsibility requirements for a class or category of tank owner/operators upon a determination that methods of satisfying the requirement are not generally available.

The EPA Administrator has made the determination that underground tank pollution insurance is not available for SSDA's members, who typically own and/or operate 10 or fewer tanks. Consequently on October 31, 1990 the effective date of the financial responsibility rules was deferred until Oct. 26, 1991 (55 Fed. Regis. 46,022). On December 23, 1991 the Administrator once again suspended the compliance deadline for the financial responsibility rules until Dec. 31, 1993. (56 Fed. Regis. 66, 369).

As a result of the unavailability of insurance at any price, on any terms and conditions, over 40 states have enacted underground tank clean-up funds. These funds are financed through a variety of mechanisms, such as higher gasoline taxes. Despite the existence of these funds, and a federal fund to cover catastrophic leaks that acts as a liability cap, gasoline retailers cannot even obtain what is called a "wrap around policy". This type of policy covers the deductible amount in the state funds. For example, if a leak clean-up costs $ 100,000; many state funds will not cover the first $ 25,000. Insurance is not available even for this paltry exposure; a fact that SSDA members can attribute only to the conduct at issue.

Again, the net effect of the actions complained of has been to place an industry that affects the lives of almost every

citizen on a daily basis in the same position as the plaintiffs in Barry. Consequently, the SSDA urges that the boycott exception should defeat the McCarran claims and the judgment of the 9th Circuit should be affirmed. The language, legislative history, and purposes of the statute also support this conclusion.

II. The Language, History and Purposes of the McCarran-Ferguson Act

SSDA urges this Court to continue to hold that exceptions to the antitrust laws, including express exceptions should be narrowly construed, and that this canon of statutory construction applies with equal force to express statutory exceptions. Indeed, in Group Life and Health Ins.Co. v. Royal Drug Co., 440 U.S. 942 (1979), the Court has applied this rule with full force to the McCarran- Ferguson Act. This in turn

requires that the concept of "boycott" in cases where the McCarran- Ferguson Act is raised as a defense be construed broadly.

Several points on the legislative history of the Act should be appreciated. First, in response to the Southeastern Underwriters decision, legislation was proposed which would have granted a blanket antitrust exemption to the insurance industry. Such efforts were defeated in Congress, but faced a certain veto in any event. See generally, Weller, Language, Legislative History and Purposes of the Mc Carron- Ferguson Act, 1978 Duke L.J. 587, 591-606.

The legislation which passed was not that pushed by the insurance industry, rather it was that promoted by the National Association of Insurance Commissioners, who were quite concerned that given the state of Commerce Clause jurisprudence in 1945,

their authority to tax and regulate the insurance business were subject to serious constitutional question. See, Weller, supra.

Not only did the blanket immunity bills fail to pass, at the insistence of those such as Sens. O' Mahoney and Pepper who defended the SEUA decision, the bill which passed affirmatively states that the antitrust laws SHALL APPLY to the business of insurance.

SSDA therefore takes issue with the statement in Petitioner's Brief at p. 23, that the dominant purpose of the Act is to provide antitrust immunity for the business of insurance, thus the boycott exception should be narrowly construed. The Act would not have passed and been signed into law but for the desire to preserve the ability of the states to regulate the industry. Even if there is sufficient state

regulation, the history of the Act is quite clear that in no case can a boycott escape antitrust scrutiny.

CONCLUSION

Accordingly, the decision of the Ninth Circuit should be affirmed as to the denial of both Mc Carran and state action immunity.

Respectfully submitted,

D G. Daskal (pro)

Dimitri G. Daskal